A **MENTERI HAL EHWAL DALAM NEGERI**

v.

RAJA PETRA RAJA KAMARUDIN & ANOTHER APPEAL

B *(The respondent's application to recuse Augustine Paul FCJ from hearing the criminal appeals No. 05-130-2008 (B) and No. 05-143-2008 (B))*

FEDERAL COURT, PUTRAJAYA
NIK HASHIM FCJ
C AUGUSTINE PAUL FCJ
ZULKEFLI MAKINUDIN FCJ
[CRIMINAL APPEAL NOS: 05-130-2008 (B) &
05-143-2008 (B)]
9 APRIL 2009

D ***CRIMINAL PROCEDURE:*** *Judge - Application to recuse judge - Grounds - Danger of real bias as applicant was critical of judge on website - Earlier habeas corpus application by applicant dismissed by judge subsequently allowed on appeal - Whether grounds justified*

E ***CRIMINAL PROCEDURE:*** *Judge - Recusal proceedings - Judge recused himself from proceedings - Whether constitutional - Courts of Judicature Act 1964, ss. 74, 78*

This was the respondent's application to recuse a Federal Court
F Judge ('the learned FCJ') from hearing the two appeals before the Federal Court consisting of a three-member panel of Federal Court judges. The 1st appeal was the Public Prosecutor's appeal against the High Court's decision allowing the respondent's application for a writ of *habeas corpus*. The 2nd appeal was the respondent's
G cross-appeal against the High Court's decision in holding that s. 8 of the Internal Security Act 1960 did not contravene the Federal Constitution. In this instant, the respondent's grounds for recusal were: (1) that there might be a danger of real bias on the part of the learned FCJ since the respondent had been critical of the
H learned FCJ on his website; and (2) that the learned FCJ when he was a High Court judge had dismissed the respondent's *habeas corpus* application in 2001 which was allowed on appeal to the Federal Court. Due to the nature of the application, the learned FCJ then recused himself from the recusal proceedings. The
I respondent objected on the ground that the learned FCJ's

absence was unconstitutional as the application could not be heard by the remaining two judges. Section 74 of the Courts of Judicature Act 1964 ('the Act') required the sitting of three Federal Court Judges for a hearing.

Held (dismissing the application)
Per Nik Hashim FCJ delivering the judgment of the court:

(1) The temporary absence of the learned FCJ during the recusal proceedings would be permissible under the words "any other cause" in s. 78(1) of the Act. Secondly, the recusal of the learned FCJ was in the course of any proceedings as required by the section. The hearing of the proceedings had already commenced when the learned FCJ recused himself. It had been fixed for continued hearing. Prior to that he had participated in the proceedings wherein he took part in the earlier decision to allow the adjournment to enable the respondent to file a written application for his recusal subsequently. It followed that the requirements of s. 78(1) of the Act were satisfied to enable the remaining two judges to continue with the proceedings. Section 74(1) of the Act did provide that every proceeding in the Federal Court shall be heard and disposed of by three judges or such greater uneven number of judges as the Chief Justice might in any particular case determine. Nevertheless, the section was a general provision that was subject to other provisions under Part IV of the Act that included s. 78. Therefore, for the purposes of the recusal proceedings, the Federal Court consisting of the remaining two judges was duly constituted notwithstanding the absence of the learned FCJ. (paras 9, 10, 11 & 12)

(2) It was noted that it was the respondent who was critical of the learned FCJ on his website in 2001. There was no response by the learned FCJ against the criticism. Furthermore, the respondent was never cited for contempt for the criticism. (para 13)

(3) As for the objection that the learned FCJ had dismissed the previous *habeas corpus* application by the respondent, the court was of the view that a judge was not precluded from hearing a case against a person whom in the past he had heard an earlier case against the said person if the facts in the cases were different. In the previous *habeas corpus* application by the

A respondent, the learned FCJ did not go into the facts of the case as it was agreed by the parties that the decision in one case that was being heard shall be binding on the respondent's application. (para 13)

B ***Bahasa Malaysia*** *Translation Of Headnotes*

Ini adalah permohonan responden supaya seorang hakim Mahkamah Persekutuan ('yang arif HMP') menarik diri dari mendengar dua rayuan di hadapan Mahkamah Persekutuan yang disidangi oleh panel tiga orang hakim Mahkamah Persekutuan. C Rayuan pertama adalah rayuan Pendakwa Raya terhadap keputusan Mahkamah Tinggi membenarkan permohonan responden untuk satu writ *habeas corpus*. Manakala rayuan kedua adalah rayuan balas responden terhadap keputusan Mahkamah Tinggi memutuskan bahawa s. 8 Akta Keselamatan Dalam Negeri 1960 D tidak melanggari Perlembagaan Persekutuan. Dalam kes di sini, alasan responden bagi penarikan diri adalah: (1) bahawa wujud kebimbangan berat sebelah sebenar di pihak yang arif HMP oleh kerana di dalam laman webnya responden telah bersikap kritikal terhadap yang arif HMP; dan (2) bahawa yang arif HMP selaku E seorang hakim Mahkamah Tinggi telah menolak permohonan *habeas corpus* responden pada tahun 2001 di mana permohonan tersebut dibenarkan oleh Mahkamah Persekutuan atas rayuan. Mengambilkira sifat permohonan, yang arif HMP telah menarik diri dari prosiding penarikan diri. Responden bagaimanapun membantah atas alasan F bahawa ketidakhadiran yang arif HMP adalah tidak berperlembagaan, disebabkan permohonan tidak boleh didengar oleh dua orang hakim. Menurut responden, s. 74 Akta Mahkamah Kehakiman 1964 ('Akta') memerlukan pendengaran disidangi oleh tiga orang hakim Mahkamah Persekutuan. G

Diputuskan (menolak permohonan)
Oleh Nik Hashim HMP menyampaikan penghakiman mahkamah:

H **(1)** Ketidakhadiran sementara yang arif HMP semasa prosiding penarikan diri adalah dibenarkan oleh perkataan "mana-mana kausa lain" di dalam s. 78(1) Akta. Kedua, penarikan diri oleh yang arif HMP adalah di dalam perjalanan suatu prosiding seperti yang dikehendaki oleh seksyen. Pendengaran prosiding I sudah pun bermula bilamana yang arif HMP menarik diri. Prosiding hanya ditetapkan untuk sambung bicara. Sebelum itu, beliau terlibat dalam prosiding dan mengambil bahagian dalam

keputusan awal membenarkan penangguhan bagi membolehkan responden memfail permohonan bertulis untuk penarikan diri yang arif HMP kemudiannya. Ianya mengikut bahawa kehendak s. 78(1) Akta telah dipenuhi bagi membolehkan dua hakim yang lain di sini meneruskan dengan prosiding. Seksyen 74(1) Akta memang memperuntukkan bahawa setiap prosiding di Mahkamah Persekutuan harus didengar dan dilupuskan oleh tiga orang hakim atau oleh jumlah ganjil hakim yang lebih ramai seperti yang ditetapkan oleh Ketua Hakim Negara bagi sesuatu kes. Walaupun begitu, seksyen ini adalah satu peruntukan umum dan tertakluk kepada peruntukan-peruntukan lain di bawah Bahagian IV Akta yang termasuk s. 78. Oleh itu, bagi maksud prosiding penarikan diri, Mahkamah Persekutuan yang mengandungi dua orang hakim yang lain tersebut telah dibentuk dengan teratur walaupun tanpa kehadiran yang arif HMP.

(2) Adalah diperhatikan bahawa di dalam laman webnya responden adalah pihak yang bersikap kritikal terhadap yang arif HMP pada tahun 2001. Namun kritikan-kritikan itu tidak dibalas yang arif HMP. Begitu juga, responden tidak pernah didakwa kerana melakukan penghinaan ekoran kritikan-kritikan itu.

(3) Berhubung bantahan bahawa yang arif HMP telah menolak permohonan *habeas corpus* terdahulu responden, mahkamah berpendapat bahawa seseorang hakim tidak boleh disingkir dari mendengar kes terhadap seseorang di mana kes terhadap orang itu pernah didengar oleh beliau sebelumnya, jika fakta dalam kes-kes berkaitan adalah berbeza. Di dalam permohonan *habeas corpus* terdahulu oleh responden, yang arif HMP tidak menyelusuri fakta-fakta kes disebabkan ianya telah dipersetujui oleh pihak-pihak bahawa keputusan dalam satu kes yang didengar akan mengikat permohonan responden.

Case(s) referred to:

Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal [2006] 1 CLJ 577 FC ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners) [2007] 4 CLJ 725 FC ***(refd)***

A *Mohamad Ezam Mohd Nor & Ors v. Inspector General of Police [2001] 3 CLJ 198 HC* ***(refd)***
Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara [2001] 4 CLJ 701 FC ***(refd)***
R v. Gough [1993] AC 646 ***(refd)***

B **Legislation referred to:**
Courts of Judicature Act 1964, ss. 74(1), 78(1)
Internal Security Act 1960, s. 8

Other source(s) referred to:
C D C Pearce, *Statutory Interpretation in Australia,* 4th edn 1996, pp 101-102, para 4.18

For the appellant - Tun Abd Majid Tun Hamzah, Senior DPP (Abd Wahab Mohamed & Najib Zakaria SFC with him)
For the respondent - Malik Imtiaz Sarwar (Azhar Azizan Harun, J Chandra,
D *Amarjit Singh, Ashok Kandiah, Sreekant Pillai & Neoh Hor Kee with him); M/s Mathews Hun Kandiah*

[Appeal from High Court, Shah Alam; Criminal Appeal No: 44-217-2008]

Reported by Usha Thiagarajah

E

JUDGMENT

(The respondent's application to recuse Augustine Paul FCJ
F **from hearing the criminal appeals No. 05-130-2008 (B) and No. 05-143-2008 (B))**

Nik Hashim FCJ:

[1] A three-member panel consisting of Nik Hashim, Augustine
G Paul and Zulkefli FCJJ, was empanelled by the learned Chief Justice to hear the Federal Court Criminal Appeals No. 05-130-2008 (B) (the 1st appeal) and No. 05-143-2008 (B) (the 2nd appeal) on 11 February 2009 at Putrajaya. The 1st appeal is the appellant's appeal against the High Court's decision allowing the
H respondent's application for a writ of *habeas corpus* for his release on 7 November 2008 whereas the 2nd appeal is the respondent's cross-appeal specifically against the High Court's decision in holding that s. 8 of the Internal Security Act 1960 did not contravene the Federal Constitution.

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[2] When both the appeals were called up for hearing on 11 February 2009, learned counsel for the respondent, Encik Malik Imtiaz Sarwar applied to recuse my learned brother Augustine Paul FCJ from hearing the appeals on the grounds that the respondent had been critical of the learned judge in his website in 2001 and that there might be a real danger of bias on the part of the learned judge if he sat on the panel to hear the appeals. He also said that as a High Court judge, Justice Augustine Paul had dismissed the respondent's *habeas corpus* application in 2001 and that the Federal Court had allowed his appeal against the order made. Learned counsel then applied for a short adjournment of the hearing to enable him to submit a formal application and to file documents in support of the application.

[3] The learned Senior Deputy Public Prosecutor, Tun Abd. Majid, objected to the application for the adjournment and argued that the question of bias did not arise in this case and urged the court to dismiss the recusal application.

[4] Having heard the parties, we at first dismissed the application for the adjournment, but upon reconsideration while still on the bench, we allowed the application for time for the learned counsel for the respondent to file a formal application by the next day ie, 12 February 2009 and we set Monday 17 February 2009 at 9.30am as the date and time for the continuation of the hearing of the recusal application. The application could not be set down for continued hearing on 12 and 13 February 2009 (Thursday and Friday respectively) as on those two dates the presiding judge Nik Hashim FCJ had to be in Kota Kinabalu together with the learned President of the Court of Appeal and the learned Chief Judge of Malaya to hear two election petition appeals No. 01(F)-19-2008 and No. 01(F)-20-2008.

[5] The respondent's formal application which was filed was marked as encl. 17(a). At the outset of the continued hearing on 17 February 2009, my learned brother Augustine Paul FCJ informed the court that he wished to recuse himself from the recusal proceeding as he considered that the nature of the application would not make his presence on the bench appropriate and his absence on the bench would be in line with the principle that justice must not only be done but also must be seen to be done. With the agreement of my learned brother Zulkefli FCJ, I

A then allowed my learned brother Augustine Paul FCJ to leave the bench leaving the two of us to continue with the hearing of the application.

[6] Then, learned counsel for the respondent contended that the B hearing would be unconstitutional as the application could not be heard by the two remaining judges on the ground that s. 74 of the Courts of Judicature Act 1964 (the Act) requires the sitting of three Federal Court Judges for a hearing. The section states:

C (1) **Subject as hereinafter provided,** every proceeding in the Federal Court shall be heard and disposed of by three Judges or such greater uneven number of Judges as the Chief Justice may in any particular case determine. (emphasis added)

D **[7]** We dismissed the learned counsel's contention and held that we were constitutionally empowered to continue hearing the recusal application by virtue of s. 78 of the Act which provides:

Continuation of proceedings notwithstanding absence of Judge

E

78(1) If, **in the course of any proceeding,** or, in the case of a reserved judgment, at any time before delivery of the judgment, **any Judge of the Court hearing the proceeding is unable, through illness or any other cause, to attend the proceeding** or otherwise exercise his functions as a Judge of that Court, **the** F **hearing of the proceeding shall continue** before, **and judgment** or reserved judgment, as the case may be, **shall be given by, the remaining Judges of the Court, not being less than two,** and the Court shall, for the purposes of the proceeding, be deemed to be duly constituted notwithstanding the absence or inability to G act of the Judge as aforesaid.

(2) In any such case as it mentioned in subsection (1) the proceeding shall be determined in accordance with the opinion of the majority of the remaining Judges of the court, and, if there is no majority the proceeding shall be re-heard. (emphasis added)

H

[8] Certain aspects of the section require to be considered. Firstly, the scope of the words "illness or any other cause" in s. 78(1) of the Act needs to be considered to determine whether the absence of my learned brother Augustine Paul FCJ during the I recusal proceeding would come within the words "any other cause" in the section bearing in mind the principle of *ejusdem*

generis. In this regard, reference may be made to *Statutory Interpretation in Australia* by D C Pearce, 4th edn. 1996, where it says at pp 101 to 102 para 4.18:

> ... the imposition of a limitation on the scope of a general expression by the application of the *ejusdem generis* principle presupposes the identification of a like group of matters. If no genus is established, the rule cannot be applied. In *R v. Regos and Morgan* [1947] 74 CLR 613 Latham CJ at 624 said that the specific things enumerated must 'possess some common and dominant feature'. An example of this approach is provided by *Stewart v. Lizars* [1965] VR 210. There is a definition of 'litter' as meaning 'bottles, tins, cartons, packages, paper, glass, food or other refuse or rubbish' was held not to attract the *ejusdem generis* principle because no single relevant genus could be spelled out of the items specifically mentioned. Hence motor car sump oil could fall within the definition.
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> The absence of a genus is seen in acute form where only one word appears before the general expression. In *Allen v. Emmersion* [1944] KB 362 the court had to consider the scope of the expression **'theatre or other place of public entertainment'. It held that the specific reference to 'theatre' did not limit the general words to places of the same genus as theatres.** A number of Australian decisions have adopted a like approach in regard to the scope of the words **'building or other place'**. **The 'place' does not have to be something akin to a building:** *Lake Macquarie Shire Council v. Ades* [1977] 1 NSWLR 126; *Plummer v. Needham* [1954] 56 WALR 1. *Compare Bond v. Foran* [1934] 52 CLJ 364 where Dixon J at 376, in considering the expression 'house, office, room, or other place' held that 'place' must be something *ejusdem generis* with the words which preceded it. There a genus was created and limited the general expression. (emphasis added)

[9] The absence of a genus is clearly seen in s. 78(1) of the Act. The specific reference to only "illness" does not create a genus to limit the general words of the section to causes of the same kind as illness or have to be something akin to an illness. Thus, the words "any other cause" are not *ejusdem generis* with the word "illness" which preceded it. Therefore, the temporary absence of my learned brother Augustine Paul FCJ to attend the proceeding for the stated reasons would be permissible under the words "any other cause" in the section.

[10] Secondly, what must be considered is whether the recusal of my learned brother Augustine Paul FCJ was "... in the course of any proceeding ..." as required by the section. The words refer to a proceeding which has already commenced.

[11] In this case the hearing of the proceeding had already commenced when my learned brother Augustine Paul FCJ recused himself. It had been fixed for continued hearing. Prior to that he had participated in the proceeding. He took part in the decision made on 11 February 2009 to allow the adjournment to enable the respondent to file a written application for his recusal on 12 February 2009. That decision was the exercise of a discretionary power agreed to by all three of us. It need not necessarily find favour with another judge if appointed to take the place of my learned brother Augustine Paul FCJ. The requirements of s. 78(1) of the Act have therefore been satisfied to enable the remaining two judges to continue with the proceeding.

[12] It is true that s. 74(1) of the Act provides that every proceeding in the Federal Court shall be heard and disposed of by three judges or such greater uneven number of judges as the Chief Justice may in any particular case determine, but by its term, the section is a general provision which is subject to other provisions under Part IV of the Act that includes s. 78. Thus, for the purposes of the recusal proceeding, the court, consisting of the remaining two judges: Nik Hashim and Zulkefli FCJJ, was duly constituted notwithstanding the absence of my learned brother Augustine Paul FCJ.

[13] It is now necessary to deal with the merits of the recusal application. On the question of judicial bias, the law in this area is settled. The test is premised on the "real danger of bias" as propounded in *R v. Gough* [1993] AC 646 which was approved and applied by the Federal Court in numerous cases such as *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65; *Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701; *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577 and recently in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners)* [2007] 4 CLJ 725. In this case, the court was urged to recuse my learned brother Augustine Paul

FCJ from being one of the panel members to hear the appeals on the grounds that the respondent had been critical of the learned judge in his website and that there might be a real danger of bias on the part of the learned judge if he sat on the panel to hear the appeals. Be it noted that it is the respondent who was critical of my learned brother Augustine Paul FCJ in his website in 2001. And there was no response by the learned judge against the criticism. Furthermore, the respondent was never cited for contempt for the criticism. With regard to the objection raised by learned counsel about my learned brother Augustine Paul FCJ having dismissed the previous application for *habeas corpus* by the respondent, it is our view that a judge is not precluded from hearing a case against a person when he had in the past heard another case against the person if the facts in the cases are different. It must also be observed that in the previous *habeas corpus* application by the respondent, my learned brother Augustine Paul FCJ did not go into the facts of the case as it was agreed by the parties in that case that the decision in one case that was being heard shall be binding on the respondent's application (see *Mohamad Ezam Mohd Nor & Ors v. Inspector General of Police* [2001] 3 CLJ 198). So, how on earth might there be a real danger of bias on the part of my learned brother Augustine Paul FCJ to sit on the panel to hear the appeals? On the facts submitted by the learned counsel, we found the grounds of the application far-fetched and ludicrous.

[14] Having said that, we (Nik Hashim and Zulkefli FCJJ) unanimously held that the recusal application was wholly without merit and as such, we dismissed the application. We then invited our learned brother Augustine Paul FCJ to take his rightful place on the bench to hear the other applications by the respondent.